STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
Jessica R. Cooper, Janet T. Neff, and Brian K. Zahra, JJ.

THE PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff-Appellant,

Docket No. 128368

-v-

MARK JOSEPH ANSTEY,

Defendant-Appellee.

_____/

BRIEF ON APPEAL – PLAINTIFF-APPELLANT

ORAL ARGUMENT REQUESTED

Aaron J. Mead (P49413)
Attorney for Plaintiff-Appellant
811 Port Street
St. Joseph, MI 49085
(269) 983-7111, Ext. 8311

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STATEMENT OF JURISDICTION

The Berrien County Circuit Court entered an order on April 20, 2004, remanding to the District Court for dismissal of the charge against defendant (95a-104a). The District Court dismissed the charge in an order on April 28, 2004 (105a-106a). The Court of Appeals granted the People's application for leave to appeal on September 9, 2004 (107a), and affirmed the Circuit Court in an opinion on February 8, 2005 (109a-110a). This Court granted the People's application for leave to appeal on October 19, 2005 (111a).

This Court has jurisdiction over this appeal pursuant to MCL 600.215(3) and MCR 7.301(A)(2).

STATEMENT OF QUESTION PRESENTED

After the police arrested defendant for driving under the influence of liquor and administered a breathalyzer test, they refused his requests, made pursuant to MCL 257.625a(6)(d), to be taken to distant locations for an independent chemical test. Instead, they offered defendant an independent test at a local hospital, which he refused. Did the Court of Appeals err in ruling that dismissal of the charges with prejudice – a remedy not provided for by the Legislature – was the only legal remedy for the failure to honor defendant's choice of test administrator?

Plaintiff-Appellant answers: "Yes."
Defendant-Appellee answers: "No."
The Court of Appeals answered: "No."

SUMMARY OF ARGUMENT

The Court of Appeals, affirming the dismissal with prejudice of the charge of operating under the influence of liquor, held that dismissal of all charges was the appropriate remedy for a police officer's failure to honor a defendant's choice of administrator for an independent chemical test pursuant to MCL 257.625a(6)(d) after the police administered a breathalyzer test (109a-110a).

The Court of Appeals' decision and the cases on which it relied, including People v Koval, 371 Mich 453; 124 NW2d 274 (1963), are erroneous because they read a remedy into the statute that is not there, and even establish it as the only remedy. They also grant drunk drivers a windfall by precluding charges that do not even depend on chemical intoxication tests.

The People request that this Court reverse the Court of Appeals and the Berrien County Circuit Court.

STATEMENT OF FACTS

Defendant was charged with Operating Under the Influence of Liquor and/or Having an Unlawful Bodily Alcohol Level (OUIL/UBAL), 2nd offense, MCL 257.625(8)(b) (before 2003 amendment[1]). The People alleged that defendant was driving on the US-31 Bypass while he was too intoxicated by the consumption of alcoholic beverages to legally operate his motor vehicle.

On April 17, 2003, Officer Shane Daniel of the Berrien Springs/Oronoko Township Police Department performed a traffic stop on defendant's car. As a result of this stop and his contact with the driver (defendant), Officer Daniel performed an additional OUIL/UBAL investigation. This investigation culminated in defendant's arrest for OUIL/UBAL (20a).

Following defendant's arrest, Officer Daniel read defendant his right, pursuant to MCL 257.625a(6)(d), to obtain an independent chemical test upon taking a chemical test administered by the police (23a-25a, 33a). Defendant was transported to the Berrien County Jail in St. Joseph, Michigan, where he submitted to the breathalyzer test offered by Officer Daniel (22a). The breathalyzer showed that defendant's blood alcohol level was .21 (28a). This was more than twice the legal limit of .10 at that time. MCL 257.625(1)(b) (before 2003 PA 61, effective 9/30/03).

Defendant requested to be taken to South Bend Memorial Hospital in Indiana for a blood test. Officer Daniel, who had no police power in Indiana, refused that request (22a). Defendant next asked to be taken to Watervliet Community Hospital in Watervliet, Michigan, about 15 or 20 minutes away (22a, 56a-57a). Officer Daniel, who had never been to that hospital and did not know how to get there, refused that request as well; his testimony implied that he believed the

[1] MCL 257.625 was amended by 2003 PA 61, effective September 30, 2003. The offense of OUIL/UBAL was renamed "operating while intoxicated." A new subsection (8) was added, so that the provision under which defendant was charged is now subsection (9)(b).

request to be unreasonable (22a-23a, 30a). This Court may take judicial notice that South Bend, Indiana, is at least 20 miles from St. Joseph, Michigan, and that Watervliet is more than ten miles from St. Joseph. See People v Keller, 238 Mich 543, 548; 213 NW 683 (1927).

Officer Daniel then offered defendant the chance to obtain an independent blood test at Lakeland Hospital (also referred to as Saint Joseph Medical Center), a few blocks away (23a, 29a, 42a, 57a).[2] Defendant refused that opportunity and, therefore, never obtained an independent test of his bodily alcohol level (23a, 29a-30a, 42a).

A violation of MCL 257.625 is established either by showing that the defendant operated a motor vehicle under the influence of alcoholic liquor (OUIL), MCL 257.625(1)(a), or by showing that the person operated a motor vehicle with an unlawful blood alcohol level (UBAL), MCL 257.625(1)(b). Unlike UBAL, OUIL does not require a showing of any particular blood alcohol level. Based on Officer Daniel's refusal to take defendant where he wanted to go, however, defendant moved to dismiss not only the UBAL portion of the charge, but the OUIL prong as well (9a-12a).[3] The People responded that defendant's requests to be taken to Indiana and Watervliet were unreasonable, and that even if MCL 257.625a(6)(d) was violated, suppression of the breathalyzer results, not dismissal of the charges, was the appropriate remedy (13a-17a).

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[2] Defendant initially disputed that Officer Daniel made such an offer (37a, 39a, 41a). The District Court, however, found that the offer was made (57a). On appeal, defendant did not dispute this finding (86a-87a).

[3] Defendant also requested suppression of the breathalyzer results on the ground that the police had failed to observe him for 15 minutes before administering the breathalyzer as required by 1994 AACS, R 325.2655(1)(e) (43a-44a). The District Court ruled against defendant on this issue (53a-54a), and defendant did not challenge that ruling thereafter.

On June 27, 2003, Judge Dennis M. Wiley of the District Court[4] heard the motion to dismiss. Following a hearing at which defendant and Officer Daniel testified, the District Court found that defendant's request to go to South Bend Memorial Hospital was unreasonable, that his request to be taken to Watervliet Community Hospital was reasonable and was denied by the officer, and that the officer did offer defendant the opportunity to go to Lakeland Hospital for testing, which defendant refused (56a-58a). The District Court orally ruled that the appropriate remedy for the violation of MCL 257.625a(6)(d) was suppression of the police-initiated breathalyzer results. The Court indicated that dismissal of the OUIL charge would be "inappropriate and somewhat draconian" (57a-58a).

Defendant filed an application for leave to appeal with the Circuit Court (60a-61a). Defendant argued that the only legal remedy for a violation of MCL 257.625a(6)(d) was dismissal of all charges (63a-66a). The People did not contest Judge Wiley's finding that defendant's request to be taken to Watervliet was reasonable. Instead, they argued again that suppression of the breathalyzer results was the appropriate remedy for the statutory violation (69a-77a). A hearing on the appeal took place in the Circuit Court on April 19, 2004 (78a-94a).

In a written opinion and order on April 20, 2004, the Circuit Court, Judge Alfred M. Butzbaugh, reversed and remanded with instructions to dismiss the case (95a-104a). Relying on Koval and other cases, the Circuit Court held that dismissal of charges was the appropriate remedy for a violation of MCL 257.625a(6)(d) (99a-104a). The Circuit Court stated that the Legislature had created a "statute-imposed due process right," but also stated that a constitutional analysis was not necessary to its decision (102a-103a). In addition, the Court opined, the

[4] Berrien County has a unified Trial Court, which is locally referred to as the "Trial Court" whether it is functioning as a District Court or a Circuit Court. For ease of reference, however, the People will refer to the District Court (Judge Wiley) and the Circuit Court (Judge Butzbaugh).

Legislature had silently acquiesced in the remedy of dismissal in the years since Koval (103a-104a). The District Court, Judge Angela M. Pasula, dismissed the OUIL/UBAL charge (105a-106a).

The People applied for leave to appeal to the Court of Appeals, which granted the application (107a). The case, however, was placed on the no-argument docket pursuant to MCR 7.214(E) (108a). A different panel of the Court affirmed the Circuit Court's decision, holding that dismissal of all charges was "the appropriate remedy"(110a, emphasis added).

This Court granted the People's application for leave to appeal (111a). This Court directed the parties

> to include among the issues to be briefed: (1) whether dismissal is the proper remedy for the denial of an independent chemical test in violation of MCL 257.625a(6)(d); and (2) whether this Court's decision in *People v Koval*, 371 Mich 453 (1963), was correctly decided. [Id.]

Additional facts will be set forth as needed in the argument.

ARGUMENT

After the police arrested defendant for driving under the influence of liquor and administered a breathalyzer test, they refused his requests, made pursuant to MCL 257.625a(6)(d), to be taken to distant locations for an independent chemical test. Instead, they offered defendant an independent test at a local hospital, which he refused. The Court of Appeals erred in ruling that dismissal of the charges – a remedy not provided for by the Legislature – was the only legal remedy for the failure to honor defendant's choice of test administrator.

Standard of Review. Whether dismissal of the charge was mandated in this case is a question of law. Questions of law are to be reviewed de novo. People v Herman, 464 Mich 593, 599; 628 NW2d 528 (2001).

The Court of Appeals' and Circuit Court's rulings that dismissal of charges was the only appropriate remedy for a violation of MCL 257.625a(6)(d) were legal error and should not be permitted to stand. The Legislature did not provide for this remedy; it was judicially created out of whole cloth, beginning with People v Koval, 371 Mich 453; 124 NW2d 274 (1963). Dismissal of charges is not contemplated by the statute's plain language and is unnecessary to its purpose. Further, since proof of the defendant's blood alcohol level is not an element of OUIL (as opposed to UBAL), dismissal of the OUIL charge is not even responsive to the violation of the statute. Instead, dismissal places the prosecution in a worse position than if the police error had not occurred.

Moreover, by holding that dismissal was the only legal remedy available, the Court of Appeals and Circuit Court failed to grant deference to the District Court's more tailored decision to suppress the results of the police-initiated chemical test. Even if dismissal were one appropriate remedy, there is no basis for concluding that the Legislature intended to preclude less severe alternate remedies, such as suppression of the results of the police-initiated test.

A. **People v Koval and other cases relied on by the Circuit Court and the Court of Appeals were wrongly decided because, contrary to the rules of statutory construction, they prescribe a remedy for a violation of MCL 257.625a(6)(d) for which the Legislature did not provide.**

MCL 257.625a governs the administration of chemical tests (blood, breath, or urine) for bodily alcohol content when a person is arrested for operating under a motor vehicle under the influence of liquor. A police officer who has reasonable grounds to believe a person has been operating under the influence may request that a chemical test, including a breathalyzer, be administered to the person. MCL 257.625a(6)(d). The results of a test requested by a police officer are admissible into evidence. MCL 257.625a(6)(a). The accused is to be advised that if he or she takes the chemical test requested by the police officer, he or she has the right to demand that a person of his or her choosing administer a chemical test. MCL 257.625a(6)(b)(*i*). Subsection (d) provides, in pertinent part:

> . . . . A person who takes a chemical test administered at a peace officer's request as provided in this section shall be given a reasonable opportunity to have a person of his or her own choosing administer 1 of the chemical tests described in this subsection within a reasonable time after his or her detention. The test results are admissible and shall be considered with other admissible evidence in determining the defendant's innocence or guilt. . . .

The statute does not provide a remedy for a violation of this subsection.

When construing a statute, this Court's primary goal is "to ascertain and give effect to the intent of the Legislature." People v Pasha, 466 Mich 378, 382; 645 NW2d 275 (2002). The Court begins by examining the language of the statute. People v Phillips, 469 Mich 390, 395; 666 NW2d 657 (2003). This Court will "'read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.'" Id., quoting Roberts v Mecosta Co Gen Hosp, 466 Mich 57, 63; 642 NW2d 663 (2002).

More particularly, this Court has repeatedly declined to impose remedies for statutory violations beyond those provided for by the Legislature. In People v Stevens (After Remand), 460 Mich 626, 643-645; 597 NW2d 53 (1999), the Court refused to apply the exclusionary rule to a violation of the "knock and announce" statute, MCL 780.656. The Court observed that "'[w]hether suppression is appropriate is a question of statutory interpretation and thus one of legislative intent.'" Id., 644, quoting People v Wood, 450 Mich 399, 408; 538 NW2d 351 (1995) (Boyle, J., concurring). The Court stated:

> The Legislature has not chosen to specifically mandate the sanction of excluding evidence seized as a result of the violation of MCL 780.656; MSA 28.1259(6). Nothing in the wording of the statute would suggest that it was the legislators' intent that the exclusionary rule be applied to violations of the "knock and announce" statute. Therefore, we decline to infer such a legislative intent. To do otherwise would be an exercise of *will* rather than *judgment*. [Stevens, supra, 460 Mich at 645.]

Stevens was followed by People v Sobczak-Obetts, 463 Mich 687; 625 NW2d 764 (2001). In that case, the police failed to comply with MCL 780.655, which at that time required them to provide a copy of the affidavit supporting a search warrant to the person from whose premises property was taken in the search. Id., 696 n 8. In holding that suppression of the evidence was not an appropriate remedy for a violation of this statute, the Court distinguished other statutory violations that might also rise to the level of constitutional violations. Id., 707-708. Because MCL 780.655 set forth only procedural requirements that did not affect the constitutionality of the warrant or the search, the propriety of suppression as a remedy was simply a question of legislative intent. Id. As in Stevens, nothing in the statute hinted that the Legislature intended suppression as a remedy for a violation of the statute. Id., 710.

People v Hamilton, 465 Mich 526; 638 NW2d 92 (2002) involved a violation of a statute addressing not searches and seizures, but arrests. A police officer arrested the defendant for

drunk driving outside of the officer's statutory jurisdiction as defined in MCL 764.2a. Id., 530. This Court found that although the arrest was without statutory authority, it was not unconstitutional. Id., 532-533. Thus, whether suppression of the evidence gleaned from the arrest (and the consequent dismissal of the case) was warranted was, again, a question of legislative intent. Id., 534. And again, because the language of MCL 764.2a did not indicate that the Legislature intended such a remedy, it was error to grant it. Id., 535.

In People v Hawkins, 468 Mich 488, 492; 668 NW2d 602 (2003), the defendant argued that evidence seized under a search warrant should be suppressed. One reason for his argument was that the affidavit in support of the warrant did not include information about the credibility of the unnamed informants upon whom the police relied, as required by MCL 780.653(B). Id., 493. Once again, this Court reaffirmed that "where there is no determination that a statutory violation constitutes an error of constitional dimensions, application of the exclusionary rule is inappropriate unless the plain language of the statute indicates a legislative intent that the rule be applied." Id., 507. The Court overruled two prior holdings suppressing evidence because of violations of MCL 780.653: People v Sherbine, 421 Mich 502; 364 NW2d 658 (1984), and People v Sloan, 450 Mich 160; 538 NW2d 380 (1995). Hawkins, 468 Mich at 511. The Court observed, "Citing nothing in the text of the statute, the *Sherbine* Court simply declared, without further analysis, that because the statute was violated, '[t]he evidence must . . . be suppressed.'" Id., 508.

The principle employed in Stevens and its progeny, moreover, has not been limited to applications concerning the exclusionary rule. In Jones v Department of Corrections, 468 Mich 646, 648; 664 NW2d 717 (2003), the plaintiff was charged with violating his parole. The fact-finding hearing on the charges was not held until after the forty-five day time limit prescribed by

MCL 791.240a(1) had run. Id., 651. At issue was whether the plaintiff was entitled to discharge from prison because of this statutory violation. Id. In a previous decision, Stewart v Department of Corrections, 382 Mich 474; 170 NW2d 16 (1969), the Court had held that the parole board's failure to hold the hearing within the statutory time limit constituted a waiver of any claim based on the alleged parole violations and entitled the plaintiff to discharge. Jones, 468 Mich at 655.

The Jones Court overruled Stewart, stating:

> The *Stewart* Court erred, in our judgment, by engrafting onto the terms of former MCL 791.240 a remedy that had no basis in the plain language of the statute. As we have recently noted on several occasions, "'our judicial role precludes imposing different policy choices than those selected by the Legislature, [and] our obligation is, by examining the statutory language, to discern the legislative intent that may reasonably be inferred from the words expressed in the statute.'" *People v Sobczak-Obetts*, 463 Mich 687, 694-695; 625 NW2d 764 (2001), quoting *People v McIntire*, 461 Mich 147, 152; 599 NW2d 102 (1999). In determining that the parole board had waived its authority and that the plaintiff was entitled to discharge, the *Stewart* Court created a remedy for a violation of former MCL 791.240 that was not grounded anywhere in the statutory scheme and thus exceeded its judicial authority. [Jones, 468 Mich at 655-656.]

The Court reiterated that inferring a legislative intent not indicated in the statutory text "'would be an exercise of *will* rather than *judgment*.'" Id., 656, quoting Stevens, supra.

The Koval decision conflicts with these principles. In Koval, the defendant appealed from his conviction under a city ordinance of driving under the influence of liquor. 371 Mich at 456. The police had not advised the defendant of his right to a chemical test under (then) MCL 257.625a(3) because they thought he was too intoxicated to understand. Id., 457. This Court disagreed. Id., 458. It broadly observed that the statute "was enacted for the protection and benefit of a defendant charged with operating a motor vehicle while under the influence of intoxicating liquor." Id. Because the police had failed to advise the defendant of this right, the defendant's conviction was "improper," and the Court remanded with directions to set aside the

verdict and sentence and discharge the defendant. Id., 459. The Court did not explain why discharge of the defendant was appropriate or discuss any other potential remedies for the statutory violation.

This Court's criticism of Sherbine in Hawkins is equally applicable to the Koval holding. As in Sherbine, supra, the Court in Koval jumped directly from the violation of the statute – MCL 257.625a – to dismissal of the case with no analysis and no basis in the statutory language for imposing that remedy.

Indeed, other language in MCL 257.625a implies that neither dismissal of charges nor suppression of the results of the police-initiated test is an appropriate remedy. Subsection (6)(a) states simply that the results of the police-initiated test are admissible; it does not condition their admissibility on the administration of an independent test. And MCL 257.625a(7) states that the provisions of subsection (6) relating to chemical testing do not limit the introduction of other admissible evidence on the issues of the individual's blood alcohol content and whether the individual was operating under the influence. Although, as discussed infra, the language of MCL 257.625a was different when Koval was decided, it contained provisions similar to those in current subsections (6)(a) and (7). 371 Mich at 454 (quoting CL 1948, § 257.625a(1)), 456 (quoting CL 1948, § 257.625a(5)).

Numerous cases after Koval have held that dismissal of charges was an, or even "the," appropriate remedy for a violation of MCL 257.625a(6)(d). All of them, including those on which the Circuit Court and the Court of Appeals relied, can be traced back to one or more of three cases: Koval, People v Burton, 13 Mich App 203; 163 NW2d 823 (1968), and People v Underwood, 153 Mich App 598; 396 NW2d 443 (1986). See People v Dicks, 190 Mich App 694, 701; 476 NW2d 50 (1991) (citing all three); People v Willis, 180 Mich App 31, 37; 446 NW2d

562 (1989) (citing Underwood); People v Hurn, 205 Mich App 618, 620; 518 NW2d 502 (1994) (citing all three); People v Prelesnik, 219 Mich App 173, 181; 555 NW2d 505 (1996), overruled on other grounds in People v Wager, 460 Mich 118, 123-124; 594 NW2d 487 (1999) (citing Dicks); People v James Green, 260 Mich App 392, 406; 677 NW2d 363 (2004) (citing Hurn, Koval, Dicks, and Underwood).

All of these cases suffer from the same defect as Koval: They prescribe a remedy for a violation of MCL 257.625a(6)(d) that simply does not exist in the statute. In Underwood, supra, for example, the Court of Appeals reversed the defendant's conviction of operating while impaired after finding that his right to obtain an independent test had been violated. 153 Mich App at 599-600. The Court dismissed the charge, but gave no authority or reasoning to support that relief. Indeed, the cursory opinion is devoid of any reference to authority beyond the Motor Vehicle Code itself. Id., 600.

Because Koval, Burton, Underwood, and their progeny erroneously created a remedy for which there is no legislative support, this Court should overrule them.

B. The Circuit Court's reasons for imposing the remedy of dismissal were erroneous.

Although MCL 257.625a makes no mention of dismissal of charges or any other remedy for denial of an independent chemical test, the Circuit Court advanced several reasons for imposing it. None of them, however, warrant the reading of a remedy into the statute.

For example, the Circuit Court offered "legislative acquiescence" as an argument in support of dismissal as the sole remedy, stating, "If the Legislature intended the remedy to be suppression of the breathalyzer results for violating a person's statutory rights, it would have said so; particularly, in response to over 40 years of judicial decisions . . . which hold that dismissal,

not suppression, is the appropriate remedy." (103a-104a). This Court, however, has squarely rejected the "legislative acquiescence" principle of statutory construction because "it reflects a critical misapprehension of the legislative process." Hawkins, supra, 468 Mich at 507. The Legislature's intent is to be determined not by its silence, but by its words. Id. As discussed, those words give no support for either dismissal of charges or suppression of evidence as a remedy.

The Circuit Court also expressed concern that unless dismissal of the entire case was the inevitable remedy, police officers would deliberately violate the statute by refusing even reasonable requests for independent tests (103a). Such policy considerations, however, are for the Legislature, not the courts. People v McIntire, 461 Mich 147, 153; 599 NW2d 102 (1999), quoting People v McIntire, 232 Mich App 71, 120; 591 NW2d 231 (1998) (Young, P.J., concurring in part and dissenting in part). In Hawkins, supra, 468 Mich at 507-508, this Court denounced Sloan, supra, for a similar imposition of policy with respect to the application of the exclusionary rule to a violation of MCL 780.653, noting, "[T]he *Sloan* majority opined that 'no remedy other than exclusion is as likely to assure the full enforcement of all of the requirements under MCL 780.653. . . .'" Clearly, that a court may find a remedy desirable for enforcing a statute is no basis for the court to write that remedy into the statute.

Finally, although the Circuit Court averred that no constitutional analysis was necessary to its decision (103a), the Court nonetheless mingled constitutional principles into that decision:

> Certainly, a due process constitutional issue is implicated under this fact scenario, especially since it relates to perishable evidence, an accused's blood alcohol level at a given time. The Legislature responded to the due process issue by mandating the statutory chemical test rights in § 625a(6)(d). This is a statute-imposed due process right. [102a.][5]

The Legislature, of course, does not create due process rights. The right to an independent test is a statutory right, not a constitutional one. People v Kerrigan, 8 Mich App 216, 219; 154 NW2d 43 (1967). It is perhaps most akin to a right of discovery. But there is no general constitutional right to discovery in a criminal case. People v Elston, 462 Mich 751, 765; 614 NW2d 595 (2000). Nor is there a constitutional right to make the police help obtain exculpatory evidence.

Moreover, the Circuit Court held defendant to a lower standard for relief than if the police or the prosecutor had actually violated his constitutional rights. Officer Daniel's denial of defendant's right to an independent test was (arguably) analogous to a failure to preserve potentially exculpatory evidence. But where a defendant claims that his due process rights have been violated by the government's failure to preserve evidence whose exculpatory value is indeterminate and only "potentially useful" to a defendant, the defendant must show that the government acted in bad faith. Arizona v Youngblood, 488 US 51, 57-58; 109 S Ct 333; 102 L Ed 2d 281, 289 (1988). In the instant case, an independent chemical test might just as likely have produced inculpatory, rather than exculpatory, evidence. But defendant never claimed, and the Circuit Court did not find, that the police acted in bad faith. On the contrary, it appears that Officer Daniel simply guessed wrong about how far he should reasonably have been required to

[5] In Burton, supra, the Court of Appeals similarly blurred the issue, citing several cases from other states for the proposition that "a person is deprived of due process of law when he is denied a reasonable opportunity, under the circumstances, to obtain a timely sample of blood at his own expense." 13 Mich App at 206-207.

transport defendant for an independent test. Thus, even if a constitutional standard were applicable, defendant would not have been entitled to relief.

C. Even if judicial creation of a remedy were permissible, the Circuit Court should have deferred to the District Court's choice of remedies.

As the People have shown, the Legislature did not intend for a violation of MCL 257.625a(6)(d) to result in the dismissal of OUIL charges against the accused. Still less did the Legislature make dismissal the only remedy.[6] Thus, even if dismissal were an appropriate remedy, the question would remain whether the District Court abused its discretion in imposing a lesser consequence for the violation in this case. As argued above, the District Court's remedy, suppression of the breathalyzer results, also finds no support in the statute. But at least it was more narrowly tailored to the violation, particularly in light of the amendments to the statute.

The Koval Court construed MCL 257.625a as it was first enacted in 1960. At that time, the statute provided that any person charged with driving under the influence had the right to an independent chemical test by a person of his own choosing; there was no condition that the accused submit to a test requested by the police. Koval, 371 Mich 453, 455-456, quoting CL 1948, § 257.625a(3). In 1980 and 1982, however, the statute was amended. The amended statute grants no right to demand a chemical test unless the accused first submits to a test at the request of the police. Broadwell v Secretary of State, 158 Mich App 681, 686; 405 NW2d 120 (1987); James Green, supra, 260 Mich App at 407. The right to demand an initial test has been

[6] Even most of the cases relied on by the Court of Appeals and the Circuit Court do not indicate that dismissal is the only remedy for a violation of MCL 257.625a(6)(d), but that it is an appropriate remedy. See Hurn, 205 Mich App at 620; James Green, 260 Mich App at 407; Willis, 180 Mich App at 37; Dicks, 190 Mich App at 701. Prelesnik, 219 Mich App at 181, erroneously cites Dicks for the proposition that dismissal is "the," rather than "a," remedy.

removed. Michigan Compiled Laws Annotated, § 257.625a, Historical and Statutory Notes, 432; Broadwell, 158 Mich App at 684-685.[7]

Instead of an unconditional right to obtain potentially exculpatory evidence, the amended statute plainly creates a reciprocal right: If, and only if, an individual submits to a chemical test requested by the police, that individual can obtain an independent test. The Legislature's apparent intent was "that the scientific evidence shall not be at the sole disposal of either party, and it ensured this result by allowing police to administer one test and allowing the accused to choose an independent person to administer a second chemical test." Dicks, supra, 190 Mich App at 699. In other words, neither the police nor the accused is to have a monopoly on chemical evidence of the accused's bodily alcohol level. See Broadwell, supra, 158 Mich App at 686.

As a consequence of these amendments, a violation of an individual's rights under MCL 257.625a(6)(d) can only occur if the police first choose to administer a chemical test. Thus, suppression of the result of that test is always available as a remedy for the violation. Dismissal of all charges is unnecessarily harsh even as a matter of equity.

In an analogous case, the Court of Appeals has held that the remedy for an illegal arrest for OUIL is not dismissal of the charge, but suppression of the evidence derived from the illegal arrest. People v Spencley, 197 Mich App 505, 508; 495 NW2d 824 (1992). Similarly, in the instant case, the prosecution should not be precluded from proceeding on the OUIL charge because the police acted illegally with respect to one type of evidence.

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[7] The cases relied on by the Circuit Court and the Court of Appeals in this case fail to account for this change in the statutory language. In Hurn, supra, 205 Mich App at 620, for example, the Court relied in part on Koval and Burton, without acknowledging the intervening amendments. And the Circuit Court's decision itself did not account for the change; instead, it stated that the original text was "comparable to the current language" (99a n 2).

In Stevens, supra, 460 Mich at 647, this Court rejected the remedy of exclusion of evidence seized in violation of the "knock and announce" statute, in part because it would "put the prosecution in a worse position than if the police misconduct had not occurred." The remedy of dismissal granted defendant just such a windfall. The police were not required to request a chemical test of defendant in the first place. If they had not requested one, the prosecution would effectively have been precluded from proceeding on the UBAL theory of MCL 257.625(1)(b). But a charge of OUIL under MCL 257.625(1)(a) could still have proceeded based solely on Officer Daniel's observations. See Spencley, supra. It makes no sense, then, to say that because the officer requested a test but failed to grant defendant an independent test, the District Court had no choice but to dismiss an OUIL case that was viable with no test at all.

In summary, the severe remedy of dismissal of charges finds no support in the statute, MCL 257.625a(6)(d), whose violation it is supposed to correct. Nonetheless, it has evolved as the only legal remedy for the failure of the police to honor an accused's choice of administrator for an independent chemical test for blood alcohol level. The Legislature did not intend this, and it is an unnecessarily harsh remedy. The People ask this Court to reverse the Court of Appeals and the Circuit Court.

REQUEST FOR RELIEF

For these reasons, the People request that this Court reverse the decisions of the Court of Appeals and the Circuit Court.

Respectfully submitted,

Dated: 12/09/05

AARON J. MEAD (P49413)
Assistant Prosecuting Attorney